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No. 00-547

IN THE SUPREME COURT OF THE UNITED STATES

KATHERINE T. WALLACE, PH.D.,
Petitioner,
v.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ET AL.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

Respectfully Submitted,
Katherine T. Wallace
Counsel of Record

2258 Huntington Avenue
Suite 381
Alexandria, VA 22303
(703) 799-5514

For Petitioner

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Petitioner, Katherine T. Wallace, respectfully submits this Reply to Brief in Opposition and respectfully renews her request that this Court grant certiorari to review the questions presented by her petition.

I. THE LOWER COURT DECISIONS AS TO THE STATUS OF COURTS CREATED PURSUANT TO THE DISTRICT CLAUSE CONFLICT WITH THIS COURT'S DECISION AND REASONING IN EMBRY V. PALMER.

Respondents argue that there is no compelling reason for this Court to review the D.C. Circuit's decision in this case. In particular, they state that there is no conflict among the circuits on the issue of whether the D.C. Superior Court is a "court of the United States," nor does the D.C. Circuit's decision below conflict with any decision of this Court. Their argument ignores the fact that the status of the Districts institutions, especially its courts, has been historically controversial and further, ignores the decisions which this Court has rendered addressing the controversy.

The decisions of the lower courts on this issue, both in this case and in the three cases relied upon below directly conflict with the reasoning and result of Embry v. Palmer, 107 U.S. 3, 30 (1882). There, contrary to the three district court decisions which ruled that the D.C. Superior Court is not a "court of the United States," this Court held that a court established under "the right of exclusive legislation over the District which the Constitution has given to Congress" was a "court of the United States." Id. at 30-31. This reasoning applies precisely to the Superior Court of the District of Columbia, which was so created.

Respondents' argument that the term "court of the United States" is limited to Article III courts, does nothing to

end the controversy. This reasoning has been overruled by Congress's 1994 passage of 18 U.S.C. § 23, which states:

> "[a]s used in [Title 18], except where otherwise expressly provided the term 'court of the United States' includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands."

18 U.S.C. § 23 (2000). The three courts included are territorial courts created by Congress under power granted it by Article IV § 3, cl. 2. See also United States v. George, 652 F.2d 1081, 1088-1089 (3d Cir. 1980). Their inclusion expressly demonstrates that the term "court of the United States" is not limited to Article III Courts and conclusively overrules the conclusion, relied on by Petitioners, that section 451 of the Judiciary Act governs the definition of the term as it is used in 18 U.S.C. §§ 1503 and 1515(a).

Indeed, the plain words of 28 U.S.C. § 451, **"[a]s used in this title,"** limit the definition's applicability to Title 28. 28 U.S.C. § 451 (1999) (emphasis added). The definition cannot be expanded to any other title or determine the meaning of the term "court of the United States" as used in 18 U.S.C. §§ 1503 and 1515(a).

Moreover, it is noteworthy that in construing the former section 1257 of Title 28, then governing certiorari and appeal, that this Court refused to imply that the D.C. Code was a "statute of a State," but held it to have its natural common sense and constitutionally correct meaning - an Act of Congress - even where the D.C. Court of Appeals is defined as "the highest court of a State" in the very same section of the statute. Palmore v. United States, 411 U.S. 389, 395 (1973). In Palmore, this Court made clear that in construing the status of the District of Columbia, its laws and institutions, courts must rely only on **express**, not implied,

congressional intent.

Within Title 18 itself, there is no indication of any intent by Congress that the D.C. Superior Court be excluded from the definition of the phrase "court of the United States." Not only does section 23 expand the definition of the term, expressly including non-Article III courts, but it is silent on the status of the District's courts. Rather, the status of the District of Columbia and its institutions is defined in many individual sections and subsections of Title 18. Those definitions are by their own terms limited to the sections or subsections in which they appear. Notably, no such definition appears within section 1503, 1512 or 1515.

Because the intent of Congress with respect to the definition of the term "court of the United States" under sections 1503 and 1515(a) of Title 18 is silent on the status of the Superior Court of the District of Columbia, because the applicable district court decisions contain inconsistent and self-contradictory reasoning and because the status of the District's courts is a controversy historically addressed by this Court, certiorari should be granted in this case.

II. THE LOWER COURTS' DETERMINATION ON THE FACTUAL QUESTION OF INTENT ON A RULE 12(b)(6) MOTION TO DISMISS IS AN EGREGIOUS DEPARTURE FROM ACCEPTED AND MANDATED PROCEDURE REQUIRING THE SUPERVISORY INTERVENTION OF THIS COURT.

In asserting that the correct standards were applied below to the motion to dismiss, Respondents argue that the lower courts were free to ignore "legal conclusions" in the First Amended Complaint:

> "corrupt intent" and "intent to influence testimony"

assertions were merely vague legal conclusions the court was not obliged to accept as true." Resp. Br. at 15.

Respondents' own argument makes clear that the lower courts acted improperly, because it is based on the proposition, contrary to well-settled law, that an allegation of intent is a legal conclusion, rather than a factual assertion.

Respondents' argument has no basis in law. It is well-settled that intent is a factual issue, a question of fact for the jury. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (Black, J., concurring in the judgment); see also Morrisette v. United States, 342 U.S. 246, 274 (1952) (holding that where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury). Thus, the courts below were indeed obliged accept the allegations of corrupt intent and intent to influence or impact testimony as true. Leatherman v. Tarrant Cty. Narcotics Unit, 507 U.S. 163, 164 (1993); United States v. Gaubert, 499 U.S. 315, 327 (1991). The district court's dismissal of the First Amended Complaint because of its failure to "prove" "corroborate" or "provide evidence" of corrupt intent is plainly an extreme departure from the accepted and legally required judicial treatment of a motion to dismiss. This departure, which the court of appeals has sanctioned, warrants this Court's supervisory intervention.

III. THERE IS NO RIGHT OF INDEMNIFICATION FOR THIRD PARTY FACT WITNESSES.

Respondents' reliance on the concept of indemnification has no basis in law and is irrelevant to the questions before this Court. Indeed, both statutory and common law indemnification principles are wholly inapplicable to dealings with third-party witnesses. All the

statutes and cases Respondents cite in their brief demonstrate that indemnification is a concept applicable only to persons who have been sued or are parties to a litigation, not to third-party fact witnesses called to testify.[1] Thus, defense of one's conduct as an employee, as well as success in that defense, is an absolute prerequisite to indemnification. See e.g. Gaines v. Walker, 986 F.2d 1438, 1442 (D.C. Cir. 1993). Witnesses in general, and the third-party fact witnesses at issue in this case have not been required to "defend their conduct."

Respondents' argument perverts an equitable principle designed to prevent the unjust enrichment of one liable party at the expense of another, to a use for which it was never intended and has never been applied: the compensation of third-party fact witness and the attendant influence over their sworn testimony. See East Penn Manufacturing Co. v. Pineda, 578 A.2d 1113, 1126 (D.C. 1990) (quoting Restatement (Second) of Torts § 886B comment c (1965): "the basis for indemnity is restitution, and the concept that one person is unjustly enriched at the

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[1] See e.g Fla. Stat. § 607.0850(1) and (2), cited by Respondents, which limits such indemnification to "any person who was or is **a party** to any proceeding" because "he or she is or was a director, officer, employee, or agent of the corporation . . . ."; (emphasis added); McLean v. International Harvester Co., 817 F.2d 1214, 1221-23 (5th Cir. 1987), cited by Respondents, (requiring Delaware company to indemnify former employee acquitted of criminal charges for acts performed as corporation's vice-president); 18B Am. Jur. 2d Corporations at §§ 1898, 1900) (indemnification promotes the desirable end of "permitting capable individuals to serve their employers with knowledge that their reasonable expenses in **defending their conduct** will be borne by [the employer] they have served if they are vindicated") (emphasis added); Jacobus v. Krambo, 78 Cal. App. 4th 1098, 1100 (2000) (holding that Cal. Lab. 2802 (cited by Respondents) requires an employer to indemnify an employee for attorney fees and costs **in defending** an action if the employee **was sued** for acts within the scope of his employment) (emphasis added).

expense of another when the other discharges liability that it should be his responsibility to pay . . . ."). This argument must be rejected

Respondents next argue that the sole basis of Petitioner's lawsuit were such reimbursement or indemnification offers. Again, Respondents are wrong in fact as well as law. The First Amended Complaint alleges that witness testimony was directly influenced and/or delayed or prevented by instructions from Skadden Arps, through its attorneys. Pet. App. at A43-A44, A50-A51, A53, A54, A57, A60, A62, A63, A64, A67-A68.

Moreover, the issue raised in the Complaint is not that Skadden Arps interfered with the attorney-client relationship between the third-party witnesses and "their" counsel, rather that Skadden Arps interfered with the due administration of justice. As the First Amended Complaint alleges and the record below reflects, those attorney-client relationships existed only at the behest and insistence of Skadden Arps. Skadden Arps made offers as soon as it learned or suspected the person would be subpoenaed. The resulting attorney-client relationships came about only because Skadden Arps, through its own individual Defendant-partners or through hired counsel acting on its instructions, solicited those third-party witnesses for representation by Skadden Arps' attorneys. Pet. App. at A37-A38, A49, A52, A54, A55, A56, A58-A59, A61, A65. The resulting attorney-client relationships, as the First Amended Complaint alleges, exist only because Skadden Arps paid for them.

Finally, Respondents argue that there is no "causal relationship between the reimbursement offer and the 'influence'. . ." Resp. Br. at 19. Again, they are incorrect. The First Amended Complaint repeatedly alleges a quid quo pro agreement. For example, Count IV reads, in part:

> [T]hird-party witness Rickman contacted

> Employment Cases Defendant Bush and/or Goetz and sought cost-free legal representation at the deposition to which she had been compelled, **in return for allowing the Employment Cases Defendants to influence her testimony under oath**, . . .

Pet. App. at A41. (emphasis added). See also Pet. App. at A42, A47, A49, A52, A56, A61, A65. Cf. United States v. Sun-Diamond Growers, 526 U.S. 398 (1999) (holding that this sort of *quid quo pro* relationship is the *sina qua non* of bribery under section 201(b)). Moreover, the First Amended Complaint alleges that Skadden Arps made offers to persons once they knew or suspected that they would be subpoenaed, in other words, "for or because of" the testimony to be given under oath. Pet. App. at A42-A43, A52, A54-A56, A58-A59, A60-A61, A65.

Nevertheless, it is plain from its Memorandum Opinion, that the district court did not accept these allegations as true, but raised the bar for the consideration of the First Amended Complaint beyond that which is legally mandated. Moreover, the district court assessed factual issues in the complaint, a departure from accepted and required legal procedure which the court of appeals sanctioned. Therefore, this Court should grant certiorari to review the court of appeals' decision.

IV. THE COURT OF APPEALS' SANCTION OF AN APPEARANCE OF IMPROPRIETY CREATED BY THE DISTRICT JUDGE'S ACCEPTANCE OF AND ACTION ON *EX PARTE* COMMUNICATIONS WITH RESPONDENTS WARRANTS CONSIDERATION BY THIS COURT.

It is undisputed that on September 16, 1998 Respondents filed a Motion to Stay consideration of

Petitioner's motion for partial summary judgment in the district court. They admit that they called the judge's chambers that same afternoon. By their own words, Defendants apparently anticipated a decision on their motion the same day it was filed, regardless of whether Petitioner had the opportunity to oppose. When they did not receive this treatment, they telephoned the judge's chambers, were immediately granted the relief they sought and it was faxed to them. Resp. Br. at 4-5.

This treatment is indeed extraordinary in light of the year long pendency of the other motions before the district court. On the other hand, Petitioner received neither call nor fax, but discovered the contact fourteen months later. Although Respondents claim that the *ex parte* contact was innocent, Petitioner, who was excluded, can never verify this claim.

Respondents urge this Court to ignore the extraordinary events surrounding their *ex parte* communication with the district court's chambers, attempting to reduce it to an innocent phone call. But according to their own admissions:

- On September 16, 1998, Respondents filed a motion to stay Petitioner's motion for partial summary judgment;

- That same afternoon, September 16, they contacted the judge's chambers "regarding an order to be issued in response to motion to stay," Rec. on App. at 673.

- That same afternoon, September 16, the district court issued and faxed an order to Respondents relieving them of the requirement of responding to Petitioner's motion for partial summary judgment and Respondents were never required to file an

opposition;

- Neither the district judge, the judge's clerk nor Respondents ever disclosed that the telephone conference took place.

This series of events, not the simple placing of a phone call to the judge's law clerk, create the appearance of impropriety. The district judge's actions, in acting immediately on an *ex parte* communication are a departure from accepted judicial procedure which is universally decried by legal and ethical principles and, which on their face, raise due process concerns.

Respondents failed to cite any case which would sanction such occurrences. Unlike Williams v. Phillips Petroleum, 23 F.3d 930 (5th Cir. 1994), for example, in which phone calls to the judge's clerk were administrative, here the ex parte telephone conference was admittedly to discuss an Order in response to a motion filed that same day, and indisputably resulted in a favorable order issued and faxed to Respondents. In short, the court accepted *ex parte* communications and acted upon them. Even if the court's actions were legally justified, they created an appearance of impropriety and prejudiced the rights of Petitioner who had no opportunity to participate in the court's considerations. See United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995). Because this is so, and because this egregious departure from accepted judicial procedure was sanctioned by the court of appeals, this Court should grant certiorari to assert its supervisory powers over the lower courts in this case.

CONCLUSION

For all the foregoing reasons, Petitioner, Katherine T. Wallace respectfully requests this honorable Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully Submitted,

Katherine T. Wallace, Ph.D.
Counsel of Record

2258 Huntington Avenue
Suite 381
Alexandria, VA 22303
(703) 799-5514

For Petitioner